

1 DENNIS J. HERRERA, State Bar # 139669
City Attorney
2 RONALD P. FLYNN, State Bar # 184186
Chief Deputy City Attorney
3 YVONNE R. MERE, State Bar # 173594
Chief of Complex & Affirmative Litigation
4 OWEN J. CLEMENTS, State Bar # 141805
SARA J. EISENBERG, State Bar # 269303
5 JAIME M. HULING DELAYE, State Bar # 270784
Deputy City Attorneys
6 Fox Plaza
1390 Market Street, Sixth Floor
7 San Francisco, CA 94102
Telephone: 415.554.3597
8 jaime.hulingdelaye@sfcityatty.org
9 *Attorneys for The City and County of San Francisco*

10 [Additional counsel appear on signature page.]
11

12 UNITED STATES DISTRICT COURT
13 NORTHERN DISTRICT OF CALIFORNIA
14 SAN FRANCISCO DIVISION
15

16 THE CITY AND COUNTY OF SAN
FRANCISCO, CALIFORNIA and THE PEOPLE
17 OF THE STATE OF CALIFORNIA, Acting by
and through San Francisco City Attorney DENNIS
18 J. HERRERA,

19 Plaintiffs,

20 v.

21 PURDUE PHARMA L.P., et al.

22 Defendants.
23
24
25
26
27
28

Case No. 3:18-cv-07591-CRB

**THE CITY AND COUNTY OF SAN
FRANCISCO'S SUPPLEMENTAL
BRIEF REGARDING RICO
STATUTORY STANDING IN
RESPONSE TO COURT'S JUNE 11,
2020 ORDER**

Judge: Honorable Charles R. Breyer

TABLE OF CONTENTS

	Page
INTRODUCTION AND SUMMARY OF ARGUMENT	1
ARGUMENT	6
I. The City has incurred extraordinary costs far in excess of the norm as a result of Defendants’ misconduct in fueling the opioid epidemic.....	6
II. Injuries sustained in the City’s proprietary capacity, both as a property owner and marketplace actor, are independently recoverable under <i>Canyon County</i>	9
A. Damage to the City’s real property attributable to the opioid epidemic confers standing under RICO.....	9
B. The City has standing to recover property losses it sustained as a marketplace actor forced to purchase products exclusively for the purpose of combating the opioid epidemic.....	10
III. Injuries to the City’s businesses survive any plausible interpretation of <i>Canyon County</i>	13
CONCLUSION	15

TABLE OF AUTHORITIES

Page

Cases

<i>Alfred L. Snapp & Son, Inc. v. Puerto Rico, ex rel., Barez</i> , 458 U.S. 592 (1982).....	5, 9
<i>Broward County, Florida v. Purdue Pharma L.P., et al.</i> , No. 1:17-md-02804-DAP, Dkt. 3274 (N.D. Ohio Apr. 27, 2020).....	4
<i>Canyon County v. Syngenta Seeds, Inc.</i> , 519 F.3d 969 (9th Cir. 2008).....	passim
<i>Chattanooga Foundry & Pipe Works v. City of Atlanta</i> , 203 U.S. 390 (1906).....	6, 14
<i>City of Almaty v. Khrapunov</i> , 956 F.3d 1129 (2020).....	12
<i>City of Cleveland v. Ameriquest Mortg. Sec., Inc.</i> , 615 F.3d 496 (6th Cir. 2010).....	7
<i>County of Monroe, Michigan v. Purdue Pharma L.P., et al.</i> , No. 1:17-md-02804-DAP, Dkt. 3285 (N.D. Ohio Apr. 30, 2020).....	4
<i>County of Oakland v. City of Detroit</i> , 866 F.2d 839 (6th Cir. 1989).....	14
<i>In re Nat'l Prescription Opiate Litig.</i> , No. 1:17-MD-2804, 2018 WL 6628898 (N.D. Ohio Dec. 19, 2018)	passim
<i>In re Nat'l Prescription Opiate Litig.</i> , No. 1:17-MD-2804, 2019 WL 4279233 (N.D. Ohio Sept. 10, 2019).....	4
<i>Oscar v. Univ. Students Co-op. Ass'n</i> , 965 F.2d 783 (9th Cir. 1992) <i>abrogated on other grounds by Diaz v. Gates</i> , 420 F.3d 897 (9th Cir. 2005)	10
<i>Reiter v. Sonotone Corp.</i> , 442 U.S. 330 (1979).....	passim
<i>West Boca Medical Center, Inc. v. AmerisourceBergen Drug Corporation, et al.</i> , No. 1:17-md-02804-DAP, Dkt. 3253 (N.D. Ohio Apr. 3, 2020).....	4

Statutes

18 U.S.C. § 1961(3)	13
18 U.S.C. § 1964(c)	2, 6, 13

Other Sources

<i>America's Addiction to Opioids: Heroin and Prescription Drug Abuse</i> , National Institute on Drug Abuse (2014), available at https://archives.drugabuse.gov/testimonies/2014/ americas-addiction-to-opioids-heroin-prescription-drug-abuse	7
---	---

INTRODUCTION AND SUMMARY OF ARGUMENT

The opioid epidemic has affected nearly every community in this country. The City and County of San Francisco (“San Francisco” or the “City”) is no exception. If anything, San Francisco is a microcosm of the societal and economic harm that the oversupply of opioids has wrought. Indeed, the foreseeable effects of the RICO defendants’ actions—drug sales, opioid injection, and discarded needles—are on full view right outside the federal courthouse.¹

Extrapolating from CDC estimates, approximately 10% of San Francisco’s residents engage in nonmedical opioid use each year. First Amended Complaint (“FAC”) (Dkt. 128) ¶ 51. Opioid-related hospitalizations, emergency room visits, and deaths are all significant and trending upwards. The death rates would be even higher but for the City’s aggressive campaign to supply the antidote to opioid overdoses—naloxone—which San Francisco paramedics administered to 1,647 people in 2018 alone. *Id.* ¶ 55. Intervening to prevent an average of more than four opioid overdoses every day is possible only because of the extraordinary steps the City has taken and costs it has incurred to combat the opioid epidemic. Nearly every department in the City—from the main library whose toilet grinders had to be replaced at great expense because of improper syringe disposal, to the Municipal Transportation Agency whose business interests in operating parking garages have been injured by opioid-related cleaning expenses—has been economically impacted by the crisis in some form or another.² Notwithstanding the City’s efforts, however, the opioid epidemic rages on, and the City continues to incur great cost in combating it.

The present situation is the consequence of the Defendants’ indifference and greed—specifically, the manufacturers’ deliberate and deceptive misinformation campaign to increase sales of opioids and all Defendants’ failure to adequately implement restrictions on distribution

¹ The oversupply of prescription opioids is primarily responsible for the corresponding rise in heroin and fentanyl abuse. *See, e.g.*, FAC ¶¶ 5 (“According to the American Society of Addiction Medicine, 80% of people who initiated heroin use in the past decade started with prescription painkillers. . . .”), 14 (“The increased volume of opioid prescribing correlates directly to . . . a concomitant rise in heroin and fentanyl abuse by individuals who can no longer legally acquire or simply cannot afford prescription opioids.”).

² In an effort to streamline this case for trial, the City does not seek to recover for all of the ways in which it has been damaged by the Opioid crisis though this lawsuit.

1 and dispensing of these extremely addictive and dangerous controlled substances.³ Through its
2 RICO claims, the City seeks to right these wrongs and to obtain compensation for the damages it
3 has suffered, and will continue to suffer, as a result of Defendants’ conduct.

4 As explained in Plaintiffs’ Omnibus Opposition (Dkt. 208 at 58-59) and further detailed
5 below, the Ninth Circuit’s opinion in *Canyon County v. Syngenta Seeds, Inc.*, 519 F.3d 969 (9th
6 Cir. 2008), does not deprive the City of statutory standing to pursue these claims. To state a
7 claim under RICO, a plaintiff must allege cognizable injuries to either “business or property.”
8 18 U.S.C. § 1964(c). Unlike the plaintiff county in *Canyon County*, San Francisco has alleged
9 both, and the underlying facts and injuries in *Canyon County* are distinguishable.

10 In *Canyon County*, the plaintiff brought a RICO claim against agricultural employers and
11 the executive director of the Idaho Migrant Council alleging the companies had engaged in an
12 “Illegal Immigrant Hiring Scheme” and that the council had “directed [its] staff to assist
13 immigrant workers in fraudulently applying for public benefits.” 519 F.3d at 972-73. Canyon
14 County claimed damages in the form of general welfare services—specifically, “millions of
15 dollars [paid] for health care services and criminal justice services for the illegal immigrants who
16 ha[d] been employed” “and/or harbored” by the defendants. *Id.* at 975. As the court noted,
17 however, those alleged damages were “speculative in the extreme” because, to accept Canyon
18 County’s allegations, “the court would have to construct the alternative scenario of what would
19 have occurred had the companies employed legally authorized workers, and determine how this
20 might have affected the County’s total population, and how these alternative workers might have
21 differed from the undocumented workers in their consumption of County services, if at all.” *Id.* at
22 983. Simply put, the court could not presume—as Canyon County had advocated—that
23 undocumented workers were more costly to the county than documented workers or, therefore,
24 that the county’s ordinary health and law enforcement expenditures were any greater than they
25 would have been absent the defendants’ conduct. The Ninth Circuit therefore dismissed the
26 action, holding that an entity acting in its sovereign capacity may not claim injury to property
27 under RICO where it has incurred expenditures based “solely” on the ordinary provision of

28 ³ The City’s RICO claims are brought against all Defendants except Walgreen Co.

1 government services. *Id.* at 976 (“When a governmental body acts in its *sovereign or quasi-*
2 *sovereign* capacity, seeking to enforce the laws or promote the public well-being, it cannot claim
3 to have been ‘injured in [its] . . . property’ for RICO purposes based *solely* on the fact that it has
4 spent money in order to act governmentally.”).⁴

5 Underlying the Ninth Circuit’s conclusion was the court’s concern that “[i]f government
6 expenditures alone sufficed as injury to property, any RICO predicate act that provoked any sort
7 of governmental response would provide the government with standing to sue.” *Id.* In other
8 words, the court refused to recognize a RICO cause of action for sovereign entities to recover the
9 routine costs of government services. To do so would open a floodgate the court could not accept
10 for any municipality seeking to tie its customary expenses to any alleged wrong.

11 The facts and injuries alleged in this case set it apart from *Canyon County* in several
12 critical ways. To begin, it is worth noting that San Francisco’s suit, unlike Canyon County’s, is
13 not motivated by desire to *avoid* providing routine government services on an equal basis to all
14 residents by excluding certain residents from its locality entirely. Put another way, the “injury”
15 Canyon County sought to redress was no injury at all—it was the presence of undocumented
16 immigrants in its community and their attendant costs to the local government. The Ninth Circuit
17 rightly found that a locality is not injured by the existence of individuals whom it disfavors. By
18 contrast, San Francisco alleges RICO damages that are based on economic *harms* it has incurred
19 in attempting to mitigate and the impacts of Defendants’ actions on its residents. In stark contrast
20 to Canyon County, San Francisco seeks to protect and provide needed services to *all* of its
21 residents.

22 Moreover, at issue here are not customary law enforcement and healthcare costs that were
23 incurred in the ordinary course of providing government services and that likely would have been
24 incurred even without the defendants’ wrongful conduct. Rather, San Francisco seeks recovery
25 for the *extraordinary* costs of services provided to combat the opioid epidemic. Finally, unlike
26 Canyon County, which sought recovery only for unspecified injuries sustained as a sovereign
27 provider of healthcare and law enforcement, San Francisco alleges additional, specific harms that

28 ⁴ Here and throughout emphasis is added unless otherwise indicated.

1 are categorically different—namely, injuries that the City sustained in its proprietary capacity (as
2 that term is used in the RICO context) as a marketplace participant, property owner, and business
3 operator.⁵

4 For many of these reasons, in considering RICO claims brought by similarly-situated
5 counties in the opioid MDL, Judge Polster repeatedly rejected the precise *Canyon County*
6 arguments that Defendants advance here. *In re Nat’l Prescription Opiate Litig.*, No. 1:17-MD-
7 2804, 2018 WL 6628898, at *9-10 (N.D. Ohio Dec. 19, 2018); Dkt. 208 at 7 (noting that “the
8 City’s RICO claims . . . are, in all material respects, identical to those that have already survived
9 extensive motion practice”), 58-59 (discussing Judge Polster’s rulings applying *Canyon County*).⁶
10 This Court should do the same.

11 In sum, consistent with Judge Polster’s rulings and the law of this Circuit, there are at
12 least four different categories of injury that independently suffice to establish statutory standing
13 after *Canyon County*—each of which the City has alleged:

14 **The City’s injuries in the form of service costs greatly in excess of the norm.** As
15 Judge Polster concluded, the scheme and injuries alleged here stand in stark relief to those in
16 *Canyon County*, where the injury alleged was *only* the supposed provision of ordinary
17 governmental services to undocumented residents, in contrast to the supposedly lesser services it
18 would have provided to in-status resident workers. There, the claim presumed that the mere
19 presence of certain people constituted a harm, which was speculative in the extreme. Here, in
20 contrast, “the scope and magnitude of the opioid crisis—the illicit drug market and attendant
21 human suffering—allegedly created by Defendants,” has forced the City “to go far beyond what a
22 governmental entity might ordinarily be expected to pay to enforce the laws or promote the

23 ⁵ In this brief, the terms “sovereign” and “proprietary” are used consistent with their meaning in
24 *Canyon County* and the Supreme Court jurisprudence arising in the RICO and related antitrust
25 contexts upon which *Canyon County* relies. These terms are not meant to reflect analysis of
“sovereign” or “proprietary” interests or capacities in any other legal context.

26 ⁶ See also *In re Nat’l Prescription Opiate Litig.*, No. 1:17-MD-2804, 2019 WL 4279233, at *4
(N.D. Ohio Sept. 10, 2019); *Broward County, Florida v. Purdue Pharma L.P., et al.*, No. 1:17-
27 md-02804-DAP, Dkt. 3274 at 13 (N.D. Ohio Apr. 27, 2020); *County of Monroe, Michigan v.*
Purdue Pharma L.P., et al., No. 1:17-md-02804-DAP, Dkt. 3285 at 27-29 (N.D. Ohio Apr. 30,
28 2020); *West Boca Medical Center, Inc. v. AmerisourceBergen Drug Corporation, et al.*, No. 1:17-
md-02804-DAP, Dkt. 3253 at 25 (N.D. Ohio Apr. 3, 2020).

1 general welfare.” *In re Nat’l Prescription Opiate Litig.*, 2018 WL 6628898, at *10; *see also* FAC
2 ¶¶ 851, 882. As Judge Polster correctly held, such extraordinary injuries are not barred by
3 *Canyon County*’s dismissal of claims “‘based *solely* on the fact that [a government] has spent
4 money in order to act governmentally.’” *Id.* (quoting *Canyon Cty.*, 519 F.3d at 976) (emphasis in
5 *In re Nat’l Prescription Opiate Litig.*).

6 **The City’s injuries as an owner of physical property.** *Canyon County* addresses only
7 injuries suffered in a government’s sovereign and quasi-sovereign capacity. 519 F.3d at 976.
8 The opinion is careful to clarify—consistent with the Supreme Court precedent it relies on—that
9 a government, like any other person or entity, may also suffer injuries in its “proprietary” capacity
10 (as that term is understood in RICO jurisprudence), including as an owner of physical property,
11 and that such injuries confer statutory standing. *Id.*; *Alfred L. Snapp & Son, Inc. v. Puerto Rico,*
12 *ex rel., Barez*, 458 U.S. 592, 601 (1982). Here, the City has clearly alleged cognizable injuries to
13 its physical property, which exist independent of its governmental role. As an illustrative
14 example, the City was forced to replace expensive toilet grinders in its main library building that
15 were destroyed by frequent disposal of needles used to inject opioids. *See* FAC ¶ 57. The City
16 can recover for all such property injuries.

17 **The City’s commercial injuries as a consumer in the marketplace.** A city or county
18 may also suffer an injury to its property in its proprietary capacity when acting as a consumer in
19 the marketplace. *Canyon Cty.*, 519 F.3d at 976. When a defendant’s illegal conduct wrongfully
20 induces a consumer expenditure, that expenditure is a valid RICO injury. *Id.*; *Reiter v. Sonotone*
21 *Corp.*, 442 U.S. 330, 340-41 (1979). As Judge Polster concluded, costs such as those “associated
22 with purchasing naloxone to prevent future fatal overdoses” “are clearly associated with
23 Plaintiffs’ *participation in the marketplace*, and for those costs, Plaintiffs can undoubtedly
24 recover” under *Canyon County*. *In re Nat’l Prescription Opiate Litig.*, 2018 WL 6628898, at *10
25 (emphasis in original). The City has alleged identical consumer injuries (and, indeed, has
26 provided even more examples) it incurred from its forced purchase of products used exclusively
27 to combat the opioid epidemic that Defendants fueled. *See, e.g.*, FAC ¶¶ 57 (seeking recovery for
28 purchases of “specialized training [courses] and materials for handling and disposal of” the opioid

1 fentanyl), 61 (seeking recovery for purchases of buprenorphine the City administered for opioid
2 treatment), 851(d), 882(d) (seeking recovery for “[i]ncreased costs associated with providing
3 police officers, firefighters, emergency and/or first responders, and other city employees with
4 naloxone . . . to block the deadly effects of opioids in the context of overdose”), 851(g), 882(g)
5 (seeking recovery for purchases of equipment required to enable Department of Public Works
6 employees to clean streets and sidewalks of improperly discarded needles and syringes), 851(h),
7 882(h) (seeking recovery for purchases of “specialized screening equipment—at a cost of
8 \$250,000 per unit” required to “detect opioids being sent into the jails”).

9 **The City’s business injuries.** All of the injuries described above relate to the City’s
10 property interests. RICO also expressly redresses injury to business. 18 U.S.C. § 1964(c).
11 *Canyon County* in no way forecloses, or in any way limits, a municipality’s recovery of business
12 injuries, which the City has alleged here. *See, e.g.*, FAC ¶¶ 71 (alleging that the opioid epidemic
13 “resulted in financial harm suffered by the City in its role as a business and marketplace
14 participant”), 796 (alleging injury to the City’s “business *and* property”), 822, 849, 872, 879
15 (same). Supreme Court precedent confirms that the City’s commercial endeavors (including, *e.g.*,
16 the operation of City-owned parking lots) constitute businesses under RICO, and the City has
17 suffered cognizable injuries to those interests by, for example, paying to clean up and properly
18 dispose discarded syringes. *See, e.g., Chattanooga Foundry & Pipe Works v. City of Atlanta*, 203
19 U.S. 390, 395 (1906); *Reiter*, 442 U.S. at 340-41.

20 Each of these injuries separately confers statutory standing, and the City’s RICO claims
21 survive any reasonable application of *Canyon County*.

22 **ARGUMENT**

23 **I. The City has incurred extraordinary costs far in excess of the norm as a result of** 24 **Defendants’ misconduct in fueling the opioid epidemic.**

25 Judge Polster has already held that, under both Sixth *and* Ninth Circuit law, sovereign
26 entities (like San Francisco) can recover damages that “go beyond the ordinary cost of providing
27 [governmental] services and are attributable to the alleged injurious conduct of Defendants.” *In*
28 *re Nat’l Prescription Opiate Litig.*, 2018 WL 6628898, at *10. As set forth in Plaintiffs’

1 Omnibus Opposition, the law of the case doctrine typically prevents transferor courts from
2 departing from MDL rulings absent clear error or an intervening change in law or fact. *See, e.g.*,
3 Dkt. 208 at 7. Neither is present here. The MDL transferee court carefully examined *Canyon*
4 *County* (and the Sixth Circuit’s reliance thereon in *City of Cleveland v. Ameriquest Mortgage*
5 *Securities, Inc.*, 615 F.3d 496 (6th Cir. 2010)) and held that it does not preclude cities and
6 counties from recovering costs “greatly in excess of the norm,” so long as they can prove the
7 costs were incurred due to Defendants’ RICO violations. *In re Nat’l Prescription Opiate Litig.*,
8 2018 WL 6628898, at *10.

9 Underpinning Judge Polster’s conclusion were two critical observations: (i) *Canyon*
10 *County*’s facts are dissimilar to those alleged in the opioids litigation and thus distinguishable,
11 and (ii) *Canyon County* precludes only alleged property interests “based *solely* on the fact that [a
12 government] has spent money in order to act governmentally.” *Id.* (citing *Canyon Cty*, 519 F.3d
13 at 976) (emphasis in *In re Nat’l Prescription Opiate Litig.*). With respect to the facts, Judge
14 Polster has repeatedly recognized that “there has never been a case with facts analogous to those
15 alleged by Plaintiffs here. It cannot be stressed strongly enough that the prescription opiates at
16 issue in this case **are Schedule II controlled substances**” (*In re Nat’l Prescription Opiate Litig.*,
17 2018 WL 6628898 at *9 (emphasis in the original))—*i.e.*, substances with a molecular formula
18 almost identical to heroin.⁷ Like the bellwether Summit County, San Francisco has alleged “a
19 wanton disregard for public health and safety exhibited by Defendants with respect to their legal
20 duty to try to prevent the diversion of prescription opioids.” *Id.* Moreover, as Judge Polster
21 observed, “the scope and magnitude of the opioid crisis—the illicit drug market and attendant
22 human suffering—allegedly created by Defendants” is tremendous. *Id.* at *10.

23 This is true, and San Francisco’s claimed injuries are quantitatively greater than, and
24 qualitatively different from, the injuries alleged in *Canyon County* and the cases cited therein.
25 The City does not seek to recover ordinary and customary costs related to everyday governmental
26 services or commonplace wrongs; nor does it seek to recover law enforcement wages or overtime,

27 ⁷ *America’s Addiction to Opioids: Heroin and Prescription Drug Abuse*, National Institute on
28 Drug Abuse (2014), available at <https://archives.drugabuse.gov/testimonies/2014/americas-addiction-to-opioids-heroin-prescription-drug-abuse>.

1 or even healthcare outlays that would have been expended irrespective of Defendants’ false
2 marketing and failure to report and halt suspicious orders. Rather, it seeks to recover the
3 extraordinary costs incurred in redressing a crisis of outsized scope and magnitude manufactured
4 by Defendants—including, for example, increased costs for “additional therapeutic and
5 prescription drug purchases, and other treatments for patients suffering from opioid-related
6 addiction and disease,” “training emergency and/or first responders and other city employees in
7 proper treatment of drug overdoses,” “training emergency and/or first responders and other city
8 employees in proper treatment of drug overdoses,” and “emergency responses . . . to opioid
9 overdoses.” FAC ¶¶ 851, 882. As one example, but for the opioid crisis that Defendants
10 orchestrated, the City would not have been required to purchase large quantities of opioid
11 antagonist naloxone for City departments (from the police department to the library), develop
12 safety protocols and train employees on how to administer the drug, distribute the drug and
13 replace it regularly upon the pharmaceutical’s expiration, and then, when City employees save
14 residents from otherwise-deadly overdoses, provide not only social services, but opioid addiction
15 treatment with buprenorphine in City-operated clinics. *See, e.g.*, FAC ¶¶ 61, 851, 882.

16 Because, as Judge Polster noted, this case presents facts like no other, it does not present
17 the slippery slope of providing too broad a basis for RICO standing that the Ninth Circuit was
18 wary of in *Canyon County*, *i.e.*, that “any RICO predicate act that provoked **any sort of**
19 **governmental response**” would suddenly become actionable. *Canyon Cty.*, 519 F.3d at 976. As
20 Judge Polster explained, the Ninth Circuit’s use of the word “solely” was intentional and “implies
21 that [municipalities] might be able to assert an injury to their property based on the expenditure of
22 money plus something else”—here, that the defendants have “forced [municipalities] to go far
23 beyond what a government entity might ordinarily be expected to pay to enforce the laws or
24 promote the general welfare.” *In re Nat’l Prescription Opiate Litig.*, 2018 WL 6628898, at *10.
25 The burden associated with Defendants’ wholesale failure to comply with statutory and
26 regulatory requirements to prevent diversion has been shifted to the City, which is now faced with
27 “clean[ing] up the mess allegedly created by Defendants’ misconduct.” *Id.* at *9-10. Thus, while
28 *Canyon County* limits what a public entity can recover when its expenditures are based solely on

1 the ordinary expenditure of money to act governmentally, it does not bar recovery for “costs
2 greatly in excess of the norm, so long as they can prove the costs were incurred due to
3 Defendants’ alleged RICO violations.” *Id.* at *10. This conclusion is sound, and this Court
4 should follow it, especially in light of the law of the case principles governing this extremely
5 complex multi-district litigation.

6 Regardless, the City has pled at least three other types of injury to “business or property”
7 that separately afford RICO standing.

8 **II. Injuries sustained in the City’s proprietary capacity, both as a property owner and**
9 **marketplace actor, are independently recoverable under *Canyon County*.**

10 Independently, the City can also pursue losses to its “business or property” suffered in its
11 proprietary capacity, as that term is used in the RICO context. *In re Nat’l Prescription Opiate*
12 *Litig.*, 2018 WL 6628898, at *9. *Canyon County* does not impose *any* limitations on the City’s
13 standing based in its allegations of injuries incurred in its non-“sovereign” or proprietary capacity
14 as a consumer or owner of physical property. 519 F.3d at 980. This distinction is critically
15 important because San Francisco is both a property owner and a consumer, and it has suffered
16 injuries in both capacities attributable to Defendants’ RICO-violative conduct. *See, e.g.*, FAC
17 ¶¶ 71, 822, 849, 872, 879. As explained below, damage to the City’s physical property and losses
18 incurred in the consumer marketplace are both recoverable property losses under RICO. Neither
19 was alleged by the plaintiff and *Canyon County*, and each establishes independent grounds for
20 statutory standing.

21 **A. Damage to the City’s real property attributable to the opioid epidemic confers**
22 **standing under RICO.**

23 By its own terms, *Canyon County*’s analysis is limited to government expenditures
24 associated with services provided in a “sovereign or quasi-sovereign capacity.” 519 F.3d at 976.
25 But, as explained in *Alfred L. Snapp & Son*, a Supreme Court case upon which *Canyon County*
26 relies, “[n]ot all that a [government] does . . . is based on its sovereign character.” 458 U.S. at
27 601. Indeed, a municipality, “like other associations and private parties[,] . . . is bound to have a
28 variety of proprietary interests,” including “own[ing] land,” and, “[a]s a proprietor, it is likely to
have the same interests as other similarly situated proprietors.” *Id.* Accordingly, *Canyon County*

1 does not preclude the City from recovering under RICO for damage to its most fundamental form
2 of property: physical property. Damage to buildings owned by the City stemming from the
3 opioid epidemic therefore provides an independent ground for statutory standing.

4 While discovery will illuminate the full extent of the physical property damage
5 attributable to the opioid epidemic that the City seeks to recover through this litigation, the FAC
6 provides an illustrative example: “[T]he City was required to replace toilet grinders at the main
7 library because drug users”—whose opioid use in many cases is attributable to the epidemic that
8 Defendants fueled—“routinely flush needles down the toilet, running the grinder pumps” to the
9 point of mechanical exhaustion. FAC ¶ 57. This is unquestionably a cognizable RICO injury
10 incurred in the City’s proprietary capacity as the owner of real property. *See Oscar v. Univ.*
11 *Students Co-op. Ass’n*, 965 F.2d 783, 786 (9th Cir. 1992) (holding that cognizable RICO injuries
12 could include “out-of-pocket expenditures” such as “costs incurred to repair damage to . . .
13 personal property”) *abrogated on other grounds by Diaz v. Gates*, 420 F.3d 897 (9th Cir. 2005).
14 Although this is but one example, it is all that is needed to establish statutory standing.⁸

15 **B. The City has standing to recover property losses it sustained as a marketplace**
16 **actor forced to purchase products exclusively for the purpose of combating**
the opioid epidemic.

17 Under *Canyon County*, the City can also recover for injuries sustained in what is described
18 as its proprietary role as “as a consumer or other type of market participant.” 519 F.3d at 976.
19 Relying on this important provision of the Ninth Circuit’s holding, Judge Polster held that costs
20 such as those “associated with purchasing naloxone to prevent future fatal overdoses” “are clearly
21 associated with Plaintiffs’ *participation in the marketplace*, and for those costs, Plaintiffs can
22 undoubtedly recover” under *Canyon County*. *In re Nat’l Prescription Opiate Litig.*, 2018 WL
23 6628898, at *10 (emphasis in original). *See also id.* (“[T]he Ninth Circuit held in *Canyon County*
24 that governmental entities can, in fact, recover in RICO for the costs associated with doing
25 business in the marketplace.”).

26 The City has alleged these exact same losses incurred in its role as a market participant.
27 *See, e.g.*, FAC ¶¶ 851(d), 882(d) (seeking “[i]ncreased costs associated with providing police

28 ⁸ Even a “modest” financial injury confers statutory standing. *Reiter*, 442 U.S. at 340.

1 officers, firefighters, emergency and/or first responders, and other city employees with naloxone
2 . . . to block the deadly effects of opioids in the context of overdose”). The City has also been
3 required to purchase buprenorphine specifically as a treatment for residents’ opioid addiction.
4 FAC ¶ 61. Additionally, in order to “detect opioids being sent into the jails,” the City was
5 required to purchase “specialized screening equipment—at a cost of \$250,000 per unit.” *Id.*
6 ¶¶ 851(h), 882(h). The City has also been required to purchase “specialized training [courses]
7 and materials for handling and disposal of” the opioid fentanyl. *Id.* ¶ 57. Further, with the
8 increase in heroin use tied to opioid addiction, the Department of Public Works has been required
9 to purchase personal protective equipment for its staff responsible for cleaning streets and
10 sidewalks of improperly discarded needles and syringes. *Id.* ¶¶ 851(g), 882(g). Were it not for
11 the opioid epidemic, the City would not have been required to purchase these items (and others)
12 from the marketplace.

13 Defendants’ contention that these marketplace injuries are foreclosed by *Canyon County*
14 rests on mischaracterizations of law and fact.

15 On the law, Defendants incorrectly suggest that a sovereign entity may recover only for
16 commercial transactions in which it is “overcharged.” Dkt. 220 at 3-4 (arguing that “the
17 Complaint does not allege, for instance, that the City was *overcharged* by Defendants for
18 naloxone in a commercial transaction”) (emphasis in original). This is incorrect. A government
19 need not allege a price-fixing conspiracy to establish standing as a market participant under
20 RICO. To be sure, *Canyon County* noted that “government entities that have been overcharged in
21 commercial transactions” stand as examples of recoverable RICO losses. 519 F.3d at 976.
22 *Canyon County*, however, did not hold that an overcharge is the exclusive harm for which a
23 municipality may recover under RICO. Rather, relying on Supreme Court precedent in *Reiter*,
24 regarding questions of municipal recovery in an analogous antitrust context, the Ninth Circuit
25 explained that a municipality suffers marketplace harm simply through “payment of money
26 wrongfully induced.” *Canyon Cty.*, 519 F.3d at 978 (quoting *Reiter*, 442 U.S. at 342). Under
27 *Reiter*, this category of injury is broad, encompassing all harms incurred “as a party to a
28 commercial transaction.” 442 U.S. at 342. *See also Hawaii v. Standard Oil Co.*, 405 U.S. 251,

1 264 (1972) (describing a municipality’s ability to sue “for injuries to its commercial interests”).
2 This is also consistent with the Ninth Circuit’s recent decision in *City of Almaty v. Khrapunov*,
3 which confirmed that under *Canyon County* any “**forced expenditures** made in a state’s
4 commercial capacity state an injury to property” under RICO. 956 F.3d 1129, 1133 (2020). The
5 City’s purchases of items necessary to combat the opioid epidemic were marketplace
6 expenditures forced by Defendants’ RICO-violative conduct.

7 With respect to the facts, Defendants claim that the purchase of naloxone is no different
8 from the injuries alleged in *Canyon County* because the government entity there presumably had
9 to purchase “weapons and cars,” for example, to provide the police services that were deemed
10 unrecoverable. *See, e.g.*, Dkt. 169 at 9. It is not clear that Canyon County actually sought to
11 recover for those marketplace purchases, but regardless, the injury alleged here is qualitatively
12 different in at least one critical way. Unlike “weapons and cars,” which are purchased generally
13 for all types of policing unrelated to the alleged RICO scheme in *Canyon County*, the specific
14 marketplace purchases identified by Judge Polster (naloxone) and those additional commercial
15 transactions alleged here (opioid-screening equipment, training courses and materials for opioid
16 disposal, buprenorphine, etc.) relate specifically—and **exclusively**—to combating the opioid
17 epidemic fueled by Defendants’ predicate acts of racketeering. Thus, unlike in *Canyon County*,
18 these are not purchases precipitated simply by “greater demand” for “public services” of the type
19 the City already provided. *See Canyon County*, 519 F.3d at 977. Rather, they are entirely novel
20 consumer expenditures forced directly by Defendants’ conduct and intended only to combat the
21 effects thereof.

22 Defendants’ conduct has forced the City to incur costs as a consumer in the marketplace,
23 purchasing products used exclusively to combat the effects of the opioid epidemic. From the life-
24 saving opioid antagonist naloxone to specialized screening equipment capable of detecting
25 fentanyl and preventing it from entering the City’s jails, the expenditures are substantial. The
26 City has lost this property acting as a marketplace participant, providing an independent basis for
27 statutory standing under *Canyon County*.
28

1 **III. Injuries to the City’s businesses survive any plausible interpretation of *Canyon***
2 ***County*.**

3 RICO confers statutory standing to “any person⁹ injured in his business *or* property.” 18
4 U.S.C. § 1964(c). The sections above address injuries to the City’s property. Separate and apart
5 from those injuries, however, the City has also alleged injury to its businesses. *See, e.g.*, FAC
6 ¶¶ 71 (alleging that the opioid epidemic “resulted in financial harm suffered by the City in its role
7 as a business and marketplace participant”), 796 (alleging injury to the City’s “business *and*
8 property”), 822, 849, 872, 879 (same).

9 These injuries are in no way foreclosed by *Canyon County* or any other controlling
10 authority. Again, in *Canyon County*, the plaintiff’s alleged injury was limited to money expended
11 in its sovereign capacity to provide ordinary “health care services and criminal justice services”
12 for its residents. 519 F.3d at 980. The Ninth Circuit found those alleged injuries insufficient
13 because (a) “a governmental body act[ing] in its sovereign or quasi-sovereign capacity. . . cannot
14 claim to have been ‘injured in [its] . . . *property*’ for RICO purposes based solely on the fact that
15 it has spent money in order to act governmentally” and (b) “the government does not possess a
16 *property* interest in the law enforcement or health care services that it provides to the public.” *Id.*
17 at 976-77. In other words, *Canyon County* focuses only on injury to property. But municipalities
18 can and do function in both sovereign capacities (providing welfare services to residents) and,
19 separately, in business capacities. As but a few examples, the City operates San Francisco
20 International Airport as a business enterprise, sells advertising space on City property (including
21 buses and trains), and operates a water system through the Public Utilities Commission, which
22 transports and sells water from the Sierra Nevada mountains not only to the City, but to numerous
23 wholesale customers outside of San Francisco. Nothing in *Canyon County* suggests that local
24 governments cannot recover injuries to these kinds of business interests. Supreme Court
25 precedent confirms that they can.

26
27 ⁹ Defendants do not and cannot challenge the City’s status as a “person,” which RICO defines to
28 include “any individual or entity capable of holding a legal or beneficial interest in property.” 18
 U.S.C. § 1961(3).

1 In *Chattanooga Foundry*, a case on which *Canyon County* relies, the City of Atlanta
2 brought suit under the Clayton Act alleging that it overpaid for “iron water pipe” as a result of the
3 defendants’ anti-competitive conduct. 203 U.S. at 395. The Supreme Court concluded that the
4 city was “[i]njured in its property, at least, if not in its business of furnishing water, by being led
5 to pay more than the worth of the pipe.” *Id.* at 396. Seventy years later, the Court observed that,
6 although the “[t]he holding of *Chattanooga Foundry*” was “grounded” in a property injury,” it
7 “could well have been grounded on the undisputed fact that the city was engaged in the
8 commercial enterprise of supplying water for a charge and, therefore, engaged in a business.”
9 *Reiter*, 442 U.S. at 340. Moreover, while both *Chattanooga* and *Reiter* analyzed the Clayton Act,
10 not RICO, *Canyon County* confirmed that the statutes’ identical “business or property” injury
11 requirements are to be interpreted “in a like manner.” 519 F.3d at 977. Thus, sovereign entities
12 that undertake a “commercial enterprise”—including by supplying a good or service “for a
13 charge”—are “engaged in a business,” and injuries to such businesses confer statutory standing
14 under RICO. *Reiter*, 442 U.S. at 340; *see also County of Oakland v. City of Detroit*, 866 F.2d
15 839, 847 (6th Cir. 1989) (finding that counties operating the “‘business’ of furnishing sewer
16 service” had standing to sue under RICO).

17 These are precisely the commercial injuries asserted through the City’s allegations that it
18 suffered “financial harm . . . in its role as a business.” FAC ¶ 71. As with its physical property
19 injuries, a fulsome analysis of these business injuries will be developed through this litigation, but
20 injuries to the City’s business interests are already apparent. The San Francisco Municipal
21 Transportation Agency (“SFMTA”), for example, provides some services that are sovereign in
22 nature, such as providing public transportation, but also acts as a business by, among other things,
23 selling advertisements on buses and at transit stops. One of its other revenue-generating business
24 operations is parking lots, at which it offers parking “for a charge.” *See Reiter*, 442 U.S. at 340.
25 Those lots are frequently littered with syringes from drug use tied to opioid addiction. Syringes
26 are hazards, not only to people, but to vehicles parked at the lots, and they are a deterrent to
27 potential customers. SFMTA maintains a cleaning contract with the Department of Public
28 Works, under which Public Works provides cleaning services on demand at the parking lots, for

1 which it invoices SFMTA based on the hours of staff time expended. This arrangement is distinct
2 from how Public Works operates in the general right of way—responding to public calls to clean
3 up streets and plazas without a contract and without invoicing any other City department. Due to
4 the frequency with which its paid parking lots are littered with syringes, SFMTA has incurred
5 increasingly expensive cleaning costs as part of this business operation. The City therefore incurs
6 these opioid-related clean-up expenses in its business-operating capacity, and those costs harm
7 the financial viability of its fee-based parking lots. These costs—and others like them—are
8 therefore injuries to the City’s *business* interests that fall squarely within RICO’s ambit, are not
9 foreclosed by *Canyon County*, and provide independent grounds for statutory standing.

10 **CONCLUSION**

11 For the foregoing reasons, *Canyon County* does not deprive the City of statutory standing
12 under RICO. The City has alleged cognizable injuries to its business and property, and
13 Defendants’ motion to dismiss the City’s RICO claims should be denied.

14 DATED: June 26, 2020

Respectfully submitted,

15 LIEFF CABRASER HEIMANN & BERNSTEIN, LLP

16 /s/ Elizabeth J. Cabraser

17 Elizabeth J. Cabraser

18 Richard M. Heimann

Paulina do Amaral

19 Kevin R. Budner

Michael Levin-Gesundheit

LIEFF CABRASER HEIMANN & BERNSTEIN, LLP

20 275 Battery Street, 29th Floor

San Francisco, California 94111-3339

21 Telephone: 415.956.1000

22 Facsimile: 415.956.1008

ecabraser@lchb.com

1 DENNIS J. HERRERA
2 City Attorney
3 RONALD P. FLYNN
4 YVONNE R. MERE
5 OWEN J. CLEMENTS
6 SARA J. EISENBERG
7 JAIME M. HULING DELAYE
8 Deputy City Attorneys
9 Fox Plaza
10 1390 Market Street, Sixth Floor
11 San Francisco, CA 94102
12 Telephone: 415.554.3957
13 jaime.hulingdelaye@sfcityatty.org

9 Aelish M. Baig
10 Matthew S. Melamed
11 Hadiya K. Deshmukh
12 ROBBINS GELLER RUDMAN & DOWD LLP
13 Post Montgomery Center
14 One Montgomery Street, Suite 1800
15 San Francisco, CA 94104
16 Telephone: 415/288-4545
17 415/288-4534 (fax)
18 aelishb@rgrdlaw.com

14 Paul J. Geller
15 Mark J. Dearman
16 Dorothy P. Antullis
17 ROBBINS GELLER RUDMAN & DOWD LLP
18 120 East Palmetto Park Road, Suite 500
19 Boca Raton, FL 33432
20 Telephone: 561/750-3000
21 561/750-3364 (fax)
22 pgeller@rgrdlaw.com

20 Thomas E. Egler
21 Carissa J. Dolan
22 Alexander M. Mendoza
23 ROBBINS GELLER RUDMAN & DOWD LLP
24 655 West Broadway, Suite 1900
25 San Diego, CA 92101
26 Telephone: 619/231-1058
27 619/231-7423 (fax)
28 tome@rgrdlaw.com

25 Louise Renne
26 RENNE PUBLIC LAW GROUP
27 350 Sansome Street, Suite 300
28 San Francisco, CA 94104
Telephone: 415/848-7240
415/848-7230 (fax)
lrenne@publiclawgroup.com

Jennie Lee Anderson
Paul Laprairie
ANDRUS ANDERSON LLP
155 Montgomery Street, Suite 900
San Francisco, CA 94104
Telephone: 415/986-1400
415/986-1474 (fax)
jennie@andrusanderson.com

Kevin Sharp
SANFORD HEISLER SHARP, LLP
611 Commerce Street, Suite 3100
Nashville, TN 37203
Telephone: 615/434-7000
615/434-7020 (fax)
ksharp@sanfordheisler.com

Edward Chapin
SANFORD HEISLER SHARP, LLP
655 West Broadway, Suite 1700
San Diego, CA 92101
Telephone: 619/577-4253
619/577-4250 (fax)
echapin2@sanfordheisler.com

David S. Casey, Jr.
Gayle M. Blatt
Alyssa Williams
CASEY GERRY SCHENK FRANCAVILLA BLATT
& PENFIELD LLP
110 Laurel Street
San Diego, CA 92101-1486
Telephone: 619/238-1811
619/544-9232 (fax)
dcasey@cglaw.com
gmb@cglaw.com
awilliams@cglaw.com

Ellen Relkin
Paul Pennock
WEITZ & LUXENBERG P.C.
700 Broadway
New York, NY 10003
Telephone: 212/558-5500
212/344-5461 (fax)
erelkin@weitzlux.com
ppennock@weitzlux.com

Attorneys for The City and County of San Francisco

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

CERTIFICATE OF SERVICE

I hereby certify that, on June 26, 2020, service of this document was accomplished pursuant to the Court's electronic filing procedures by filing this document through the ECF system.

/s/ Elizabeth J. Cabraser
Elizabeth J. Cabraser